MOHD AMINURDIN AHMAD v. PP

HIGH COURT SABAH & SARAWAK, MIRI
ALWI ABDUL WAHAB JC
[CRIMINAL APPEAL NO: MYY-42H-3-9-2017]
21 DECEMBER 2017

CRIMINAL PROCEDURE: *Sentencing – Appeal against sentence – Accused charged for offence of rape under s. 376(2)(d) of Penal Code – Sessions Court sentenced accused to ten years' imprisonment – Grounds of appeal – Age and antecedents of accused – Youthful offender – Whether accused should be bound over under s. 293 and s. 294 of Criminal Procedure Code – Whether victim volunteered herself to incident – Whether sentence passed by Sessions Court appropriate*

On 12 March 2017, at about 10pm, the complainant ('the victim') went out with her female friend, Haslina together with two other males named 'Mirul' and 'Am'. Both the victim and Haslina later went their separate ways where Haslina followed Mirul whilst the complainant followed Am ('the appellant') on a motorcycle. The victim was brought to various places before they finally stopped at Lutong beach where the appellant raped the complainant. Thereafter, the appellant sent the victim back to her house. The appellant was arrested on 15 March 2017 and was subsequently charged under s. 376(2)(d) of the Penal Code. The appellant pleaded guilty to the charge and was sentenced to ten years' imprisonment by the Sessions Court Judge ('SCJ'). Dissatisfied with the sentenced imposed by the SCJ, the appellant appealed, *inter alia*, on the grounds that (i) the sentence imposed by the SCJ was manifestly excessive without judicially considering the age and antecedents of the appellant who was 19 years old at the time of the commission of the offence. It was the appellant's submission that the appellant, being a youthful offender, should be bound over under s. 293 and s. 294 of the Criminal Procedure Code; and (ii) the victim volunteered herself to follow the appellant who was unknown to her. Had she not followed the stranger, the incident could have been avoided.

Held (dismissing appeal; upholding decision of Sessions Court):

(1) The High Court will not normally interfere with a sentence judicially considered by a lower court as long as it passes sentence according to the correct principle of law. On the facts, the offence committed by the appellant was serious and its severity had far outweighed the clean record of the appellant. Further, the appellant's submission that the complainant should not have followed the appellant in the first place could not be used as an excuse for the appellant to commit rape against her. The complainant was merely following the appellant for the motorcycle ride and did not consent to such criminal act. (paras 7, 8 & 9)

(2) The appellant's act was premeditated because the complainant was brought to various places after midnight before she was raped at a strategic location at Lutong beach. It would have been a different case if the sexual act is consensual, therefore no force was applied to cause the injury to the complainant. Also, s. 293 of the Criminal Procedure Code could not be used arbitrarily in the sense that, if the offence is committed by a youthful offender, he will automatically be entitled to a lenient sentence and to be bound over. (para 12)

(3) The punishment for rape under s. 376(2)(d) of the Penal Code carries an imprisonment term of not less than ten years and not more than 30 years and also liable to whipping. In the present case, the SCJ had passed a minimum imprisonment sentence and spared the appellant from the sentence of whipping because of his young age. (para 14)

(4) Considering the serious nature of the offence, the manner how it was committed by the appellant and the traumatic ordeal that the complainant has to go through for the rest of her life, the SCJ was not wrong in passing the sentence as he did. (para 16)

Case(s) referred to:
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
Tukiran Taib v. PP [1955] 1 LNS 166 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 293, 294, 305
Penal Code, s. 376(2)(d)

For the appellant - Shikh Rajjish Ahmad; M/s Shad & Partners Advocs
For the respondent - Wan Mohd I'zzat Wan Abdullah; DPP

Reported by Sandra Gabriel

JUDGMENT

Alwi Abdul Wahab JC:

Introduction

[1] This is an appeal on sentence by the appellant against the decision of the learned Sessions Court Judge ("SCJ") handed down on 5 September 2017 whereby he sentenced the appellant to ten years' imprisonment for an offence of rape under s. 376(2)(d) of the Penal Code.

The Charge

> Bahawa kamu pada 13.3.2017 jam lebih kurang antara 0130hrs hingga 0400hrs bertempat di tepi kawasan pantai Lutong, di dalam daerah Miri, di dalam Negeri Sarawak, didapati telah merogol seorang perempuan bernama FAN (P), kpt: xxx, umur: 15 tahun 04 bulan. Oleh yang demikian, kamu telah melakukan 10 kesalahan yang boleh dihukum di bawah seksyen 376(d)(d) Kanun Keseksaan.

The Facts

[2] Briefly, the facts of the case are that on 12 March 2017 at about 10pm, the complainant ie, the victim in the present case went out with her female friend, Haslina together with two other males named "Mirul" and "Am" who are the friends of Haslina. Both, the complainant and Haslina later went on their separate ways where Haslina followed Mirul whilst the complainant followed Am on a motorcycle. The complainant was brought to various places namely Marina Bay, Tanjung Lobang, City Fan before they finally stopped at Pulau Melayu at about 12.05am on 13 March 2017 to wait for Haslina and Mirul. When both Haslina and Mirul did not appear until 1.30am, Am and the complainant proceeded to Lutong beach where Am raped the complainant. Thereafter, Am sent the complainant back to her house at Desa Pujut at about 4am. Am is the appellant in the present case. He was arrested on 15 March 2017.

The Appeal

[3] The appellant pleaded guilty to the above charge and sentenced to ten years' imprisonment. Since the appellant had pleaded guilty to the charge, the appeal is only confined to the extent and legality of the sentence as provided under s. 305 of the Criminal Procedure Code ("CPC").

[4] The crux of the appeal by the appellant was that the sentence imposed by the learned SCJ was manifestly excessive without judicially considering the age and antecedents of the appellant who was 19 years old at the time of the commission of the offence. It was the appellant's submission that the appellant being a youthful offender should be bound over under s. 293 and s. 294 of the CPC.

[5] Learned counsel for the appellant submitted that the learned SCJ had failed to consider and to take into consideration the conduct of the complainant when she volunteered herself to follow the appellant who was unknown to her. Had she not followed the stranger, the incident could have been avoided. It was also submitted that the complainant's parents should not have allowed the complainant to go out at the late hour of the night as she was only 15 years old at that material time.

[6] It was further contended by learned counsel for the appellant that there was a plea bargaining conducted in the learned SCJ's chambers in the presence of the parties ie, learned Deputy Public Prosecutor and learned counsel for the appellant on 14 August 2017 before the appellant decided to plead guilty.

The Court's Findings

[7] It is a trite law that the High Court will not normally interfere with a sentence judicially considered by a lower court as long as it passes sentence according to the correct principle of law.

[8] I agreed with the learned SCJ when he viewed the offence committed by the appellant as serious and its severity far outweighed the clean record of the appellant.

[9] Learned counsel's submission that the complainant should not have followed the appellant in the first place, to a certain extent, may be correct but this cannot be used as an excuse for the appellant to commit rape against her. The complainant was merely following the appellant for the motorcycle ride and did not consent to such criminal act.

[10] I am aware of the established principle of sentence of the young offender as pronounced in the case of *Tukiran Taib v. PP* [1955] 1 LNS 166; [1955] 21 MLJ 24 where Bellamy J held, *inter alia*, that:

> It is desirable that young offenders, that is, offenders between the ages of 17 and 21, who are first offenders should be kept out of prison, if possible.

[11] Learned counsel for the appellant referred to the case of *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370 which case involved a young offender committing a statutory rape against an underage girl who consented to the act. He was bound over by the Court of Appeal pursuant to s. 294 of the CPC. The fact of that case must be distinguished with the fact of the present case. As the learned judge in the present case had stated in his grounds of sentencing that the sexual act was not consensual, and the element of assault involved where the complainant had sustained bodily injuries as a result of the appellant's act. Even in *Afizal*'s case *(supra)*, the Court of Appeal has stated in clear terms that whatever sentence that is going to be imposed on this type of cases which involved young offenders must be based on the facts of each individual case. Simply put, this is not a case where one size fits all.

[12] The learned SCJ said that he had considered the mitigation raised by the appellant including the fact that he is a disabled person with a hearing problem but the learned SCJ was quick to add that the appellant should have thought of the consequences of his action prior to committing the offence. Reading from the facts of the case, I find that the appellant's act was premeditated because the complainant was brought to various places after midnight before she was raped at a strategic location at Lutong beach. It would have been a different case if the sexual act is consensual, therefore no force was applied to cause the injury to the complainant. I agree with the learned DPP that s. 293 of the CPC cannot be used arbitrarily in the sense that, if the offence is committed by youthful offender, he will automatically be entitled to a lenient sentence and to be bound over (*PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645).

The Social Report

[13] The learned SCJ had also considered the appellant's social report and took into account the suggestion by the welfare officer for the court to pass appropriate sentence against the appellant according to the offence he committed. Part of the recommendations as stated in the social report are as follows:

> 7.0 Pandangan/Ulasan/Syor
>
> Secara keseluruhannya, semasa kejadian penama berumur 19 tahun 09 bulan 0 hari. Menunjukkan bahawa penama seorang pesalah muda. Ini jelas menunjukkan penama adalah seorang yang masih belum matang bukan sahaja daripada segi pemikiran malah tindak-tanduk beliau kerana pada usia ini, kebiasaannya mereka lebih suka ikut kata hati dan tidak berfikir panjang tanpa memikirkan kesan akibat perbuatan mereka sendiri.
>
> Namun begitu, penama menyesal atas perbuatan beliau dan beliau berjanji akan lebih berhati-hati serta tidak mengulangi kesalahan ini lagi. Pihak keluarga penama sanggup untuk menjamin mahupun menerima penama semula dalam keluarga mereka selepas ini.

Whether The Sentence Passed On The Appellant Is Excessive

[14] The punishment for rape under s. 376(2)(d) carries an imprisonment term of not less than ten years and not more than 30 years and also liable to whipping. In the present case, the learned SCJ had passed a minimum imprisonment sentence and spared the appellant from the sentence of whipping because of his young age. It goes without saying that the learned SCJ had considered the overall factors before passing sentence.

Plea Bargaining

[15] On the issue of plea bargaining claimed by learned counsel for the appellant, regret to say that the notes of proceedings did not show such plea bargaining had taken place before the learned SCJ. On the contrary, the notes of proceedings showed that the prosecution had pressed for a sentence that reflects the severity of the offence and the sentence imposed must be able to send a strong message to the public that the court views such offences with complete abhorrence.

Conclusion

[16] Considering the serious nature of the offence, the manner how it was committed by the appellant and the traumatic ordeal that the complainant has to go through for the rest of her life, I am of the view that the learned SCJ was not wrong in passing the sentence as he did. The appeal is dismissed, and the sentence imposed by the learned SCJ is accordingly upheld.